89-1995

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MIKE SEXTON, *Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person, Petitioners*

v.

Lone Star Life Insurance Company and Pacific Mutual Insurance Company, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix

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Attorneys for Petitioners

Fort Worth Bind Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 - Phone 817-332-8791

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Fifth Circuit conflicts with the notions of due process, fair play and Federal Rules of Civil Procedure 4(a) and 77(d).

2. Whether the decision of the Court of Appeals for the Fifth Circuit violates the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

1. Mike Sexton, individually and as limited guardian of the separate estate of Julie Sexton, an incapacitated person.
2. Counsel: Kelley, Davis & Bates, P.C., Dallas, Texas.
3. Lone Star Life Insurance Company.
4. Counsel: Thompson & Knight, Dallas, Texas.
5. Pacific Mutual Insurance Company.
6. Counsel: McDonald, Sanders, Ginsburg, Newkirk, Gibson & Webb, Ft. Worth, Texas.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MIKE SEXTON, *Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person, Petitioners*

v.

Lone Star Life Insurance Company and Pacific Mutual Insurance Company, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix

REFERENCE TO OPINIONS BELOW

The unpublished opinions of the United States Court of Appeals for the Fifth Circuit and other pertinent information is reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 7, 1990. Petition for Rehearing was denied on March 28, 1990.

The Supreme Court of the United States has jurisdiction to grant this petition and review the decision of the Court of Appeals under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

(1) Amendment V, U.S. Constitution:

> No persons shall be . . . deprived of life, liberty, or property, without due process of law . . .

(2) Rule 4(a)(1), Federal Rules of Appellate Procedure:

> In a civil case in which an appeal is permitted by law as a right from the District Court to a Court of Appeals the notice of appeal required by Rule 3 shall be filed with the Clerk of the District Court within thirty (30) days after the date of entry of the Judgment Order appealed from. . . .

(3) Rule 77(d), Federal Rules of Civil Procedure:

> **Notice of Orders or Judgments.** Immediately upon the entry of an Order or Judgment, the Clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. . . . lack of notice of the entry by the Clerk does not affect the time to appeal a relief or authorize the Court to relieve a party for failure to appear within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

Julie Sexton, an incapacitated person, used to be a vibrant, healthy adult until medical negligence turned her into an incapacitated person. Julie Sexton's employer contracted for medical insurance benefits with Defendant Pacific Mutual Insurance Company for the care and treatment of Julie Sexton. Because Julie Sexton could not continue working after her incapacitating injuries, Julie Sexton's employer arranged for her estate to continue Julie Sexton's medical benefits with

Defendant Pacific Mutual Insurance Company. Despite an agreement by Pacific Mutual Insurance Company that it would continue to insure Julie Sexton after her incapacitating injuries, Defendant Pacific Mutual Insurance Company reneged on its agreement and refused Julie Sexton the medical care and treatment that she desperately needs.

Julie Sexton, an incapacitated person, filed suit in Honorable Judge David Belew's District Court in the Northern District of Texas. Pacific Mutual Insurance Company urged the defense of ERISA in denying Julie Sexton medical benefits and all parties filed Motions for Summary Judgment and briefs in support of their Motions for Summary Judgment in May, 1989. During this time, the Honorable Judge David Belew, Jr. was presiding over the well-known *Delta* trial that took well over one year. No one in this case expected a quick decision on the Summary Judgment Motions. Everyone did expect that the District Court would send out a copy of Judge Belew's opinion and Judgment in this case shortly after it was rendered as required by Federal Rule of Civil Procedure 77(d). Despite entering Summary Judgment in favor of Defendants on June 21, 1989 and denying Julie Sexton's Motion for Summary Judgment, it was not until after December 19, 1989 that Julie Sexton's attorneys or any of the Defendants were mailed a copy of Judge Belew's opinion and Judgment in this case. *See* Affidavit of Notice of Judgment attached in appendix at B-3. Julie Sexton filed her Notice of Appeal within thirty (30) days of receiving notice of the Judgment.

The Fifth Circuit Court of Appeals dismissed Julie Sexton's appeal claiming that Julie Sexton had failed to timely file a Notice of Appeal claiming the Fifth Circuit lacked authority to accept an alleged untimely filed Notice of Appeal. Julie Sexton requested a rehearing because case law shows that the Fifth Circuit does have jurisdiction over the appeal and Julie Sexton did timely file her Notice of Appeal.

REASONS FOR GRANTING THE WRIT

1. The Issues Are Important

The immediate issue in this case is whether the District Clerk can rob Julie Sexton of her right to appeal by failing to give notice of the Final Judgment to any of the parties. The Fifth Circuit opinion allows this tragedy to occur while Eighth Circuit case law recognizes this tragedy and brings a common sense solution to this situation. Failure of this Court to address this issue will cause all attorneys in the Fifth Circuit to daily contact the District Courts to determine the status of judgments in those cases. Needless to say, the District Clerk cannot handle these telephone calls that are being unnecessarily created by the Fifth Circuit's denial of Julie Sexton's and other persons' due process and the common sense of the law.

2. The Fifth Circuit Erred in Dismissing Julie Sexton's Appeal Because Julie Sexton Filed a Timely Notice of Appeal

Julie Sexton timely filed her Notice of Appeal because she filed her Notice of Appeal within 30 days after notice of the Judgment from the District Court. *See* FED.R.APP.P. 4(a); *Buckeye Cellulose Corp. v. Braggs Electric Const. Co.*, 569 F.2d 1036 (8th Cir. 1978); *Fidelity and Deposit Co. of Maryland v. Usaform Hail Pool, Inc.*, 523 F.2d 744, 749-751 (5th Cir. 1975).

The District Court's duty is to immediately inform all parties when an Order or Judgment is rendered in a case. FED.R.CIV.P. 77(d). Because the Notice of Judgment is tied to the Appellant time table, the District Court's failure to inform a party of an adverse judgment and the Appellate Court's subsequent refusal to review the District Court's judgment, results in a denial of due process. *See* U.S. CONST. Amend V; *Buckeye Cellulose Corp. v. Braggs Electric Const. Co.*, 569 F.2d 1036 (8th Cir. 1978); *Fidelity and Deposit Co. of*

Maryland v. Usaform Hail Pool, Inc., 523 F.2d 744, 749-751 (5th Cir. 1975).

The only evidence before this Court shows that the District Clerk did not mail out copies of the Judgment and Memorandum Opinion to Petitioner Julie Sexton or Respondent Lone Star Life Insurance Company until after December 19, 1989. *See* Affidavit of Notice of Judgment attached in appendix at B-3. Within 30 days of being informed of the rendered judgment, Julie Sexton filed her Notice to Appeal and paid the appropriate fees. Because neither Julie Sexton nor Respondents knew of Judge Belew's judgment and opinion until after December 19, 1989, no party is prejudiced by lack of notice unless Julie Sexton is denied her right to appeal on jurisdictional grounds.

3. The Fifth Circuit Decision Conflicts with the Eighth Circuit Case Law

The Fifth Circuit cites in its opinion denying Julie Sexton her right to appeal the case of *Robbins v. Maggio*, 750 F.2d, 405, 408 (5th Cir. 1985) and *Pryor v. U.S. Postal Service*, 769 F.2d 281, 285 (5th Cir. 1985) for the authority that the Fifth Circuit cannot exercise jurisdiction over this appeal. However, these cases are easily distinguishable from the issue in this case because in *Robbins* and *Pryor*, it was the attorney's neglect that caused the untimely Notice of Appeal. In Julie Sexton's case, it is the District Court's neglect of its duty that caused the alleged failure to timely file a Notice of Appeal. No question exists that Julie Sexton filed her Notice of Appeal within 30 days of receiving notice of the District Court's Judgment. Accordingly, due process, fair play and equity cry out that the Fifth Circuit be required to accept her appeal.

The Eighth Circuit has recognized the equity and common sense approach to this situation by allowing a party to appeal a case within 30 days after it receives notice of a judgment from the District Clerk, even though this Notice of Appeal

may be filed months after the final judgment. *See Buckeye Cellulose Corp. v. Braggs Elect. and Const. Co.*, 569 F.2d 1036 (8th Cir. 1978). The Eighth Circuit recognizes that when it is the District Court's neglect that caused the delay in filing the Notice of Appeal – as compared to the attorney's neglect – equity, due process and a common sense reading of the Rules of Civil Procedure allow the Appellant to be able to exercise its full appellate relief.

Petitioner Julie Sexton, an incapacitated person, simply requests this Court to allow her to appeal an adverse judgment rendered against her by the District Court. It is clear that the District Clerk did not mail out copies of the Judgment and Opinion as she is required to do under Federal Rule of Civil Procedure 77(d). It is also clear that Julie Sexton's counsel was diligent in filing the Notice of Appeal as soon as they received reasonable notice of the judgment. To deny Julie Sexton, an incapacitated person, her right to appeal the merits of the District Court's decision is to allow the District Court to unfairly rule against Julie Sexton and rob Julie Sexton of her right to appeal by not mailing out copies of the judgment until after the appellate timetable passed.

CONCLUSION

This Court should not allow a District Clerk to disobey a mandate of the Federal Rules of Civil Procedure and rob an incapacitated person of her right to appeal.

For the foregoing reasons, Petitioners respectfully request the United States Supreme Court to grant this Petition for Writ of Certiorari and grant Petitioners all the relief to which they are entitled.

Respectfully submitted,

KELLEY, DAVIS & BATES,
A P.C.

By _____

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Attorneys for Petitioners

APPENDIX

[U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED JUN 21 1989 NANCY DOHERTY, CLERK By Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-87-442-K

MIKE SEXTON, Individually and as Limited Guardian
of the Separate Estate of JULIE SEXTON
an Incapacitated Person

vs

LONE STAR LIFE INSURANCE COMPANY and
PACIFIC MUTUAL INSURANCE COMPANY

JUDGMENT

In conformance with the Memorandum Opinion signed this date, it is ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED; Defendant Pacific Mutual Insurance Company's Motion for Summary Judgment is GRANTED; Defendant Lone Star Life Insurance Company's Motion for Summary Judgment is GRANTED; and

It is further ORDERED that Judgment in favor of Defendants is GRANTED.

IT IS SO ORDERED.

SIGNED this 21 day of June, 1989.

/s/David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

ENTERED ON DOCKET 6-25-89 PURSUANT TO F.R.C.P. RULES 58 AND 79a

[U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED JUN 21 1989 NANCY DOHERTY, CLERK By Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CIVIL ACTION NO. 4-87-442-K

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of JULIE SEXTON, an Incapacitated Person

vs

LONE STAR LIFE INSURANCE COMPANY, and PACIFIC MUTUAL INSURANCE COMPANY

MEMORANDUM OPINION

All parties to this suit have filed motions for summary judgment. The Court is of the opinion that Plaintiffs' motion should be denied and Defendants' motions should be granted.

I. FACTS

Defendant Lone Star Life Insurance Company ("Lone Star") issued a group insurance policy to the law firm of Brown, Herman, Scott, Dean & Miles ("law firm"). This group insurance policy provided insurance benefits for all employees of the law firm.

Plaintiff Julie Sexton was employed by the law firm when she suffered a stroke. Before Ms. Sexton terminated her employment, she contacted Lone Star to determine whether she could convert the group policy to an individual policy. On

July 8, 1986, Wylene Taft, Group Account Representative and Agent for Lone Star, sent Ms. Sexton a letter offering to allow Ms. Sexton to convert the group insurance policy to an individual policy. The letter stated: "You are eligible to convert your group insurance to an individual policy, provided the application and first premium payment are submitted within 31 days of your termination date."

Ms. Sexton applied for conversion benefits on September 25, 1986. The application contained the following language: "It is understood that no coverage is in force until premium is received by Lone Star Life and notice in writing of approval has been furnished by Lone Star Life." Lone Star refused to convert the policy and returned Ms. Sexton's premium on September 29, 1986.

Defendant Pacific Mutual Insurance Company ("Pacific Mutual") purchased and assumed the law firm's group insurance policy on October 1, 1986. Pacific Mutual did not purchase or assume any individual conversion policies issued by Lone Star. Pacific Mutual assumed the ministerial function of processing all claims for benefits submitted under the group policy on or after October 1, 1986, and those claims filed before but not resolved by that date. Pacific Mutual assumed the responsibility of deciding to pay or deny claims only with respect to claims initially submitted after September 30, 1986, by persons covered by the assumed policies after that date. Lone Star retained the final responsibility for deciding whether to pay or deny claims initially filed before September 30, 1986, and claims filed by persons no longer covered by the policies assumed by Pacific Mutual on that date. Pacific Mutual performed the ministerial function of processing claims submitted by Ms. Sexton after September 30, 1986. Lone Star, however, retained final decision-making authority with respect to those claims.

Plaintiffs have sued under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, for the arbi-

trary and capricious denial of the application for conversion to an individual policy or, alternatively, for violation of the contract of insurance with Lone Star.[1]

II. DISCUSSION

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs have moved for summary judgment on the ground that Lone Star's offer of conversion and Ms. Sexton's acceptance of the offer of conversion produced a contract of conversion of insurance benefits. Plaintiffs argue that the refusal to convert is a breach of that contract.

Defendant Lone Star responds that Plaintiffs' breach of contract claims are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. Alternatively, Lone Star argues that no contract was formed because formation was conditioned upon written approval, as provided in the application, and the application was not approved. Finally, Lone Star argues that Ms. Sexton was not eligible for conversion because she has similar benefits under Medicare, and those similar benefits preclude conversion.

The Court is of the opinion that Plaintiffs' state law claims of breach of contract are preempted by ERISA. 29 U.S.C. § 1144(a) ("the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)"); *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ___ , 109 S.Ct. ___ , 95 L.Ed.2d 55, 62 (1987) ("common law contract and tort claims are pre-empted by ERISA"). Plaintiffs' claims for breach of a contract to convert are preempted by federal law. Plaintiffs' motion for summary judgment, therefore, should be denied.

---

[1]Plaintiffs' Third Amended Complaint also complains of Defendants' refusal to pay a treatment claim. The summary judgment evidence shows that the claim has been paid, and Plaintiffs have agreed to drop this claim.

B. Pacific Mutual's Motion for Summary Judgment

Defendant Pacific Mutual has moved for summary judgment on the ground that it is not a proper party to this lawsuit. Proper party defendants in an action under 29 U.S.C. § 1132(a)(1)(B) are (1) the employee benefit plan as an entity, or (2) a fiduciary of the plan. *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-25 (9th Cir. 1985). ERISA defines a fiduciary of the plan as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

29 U.S.C. § 1002(21)(A).

Plaintiffs complain of an unfavorable conversion coverage determination. Pacific Mutual did not make and did not have the discretionary authority to make the determination. The decision not to convert the group policy to an individual policy was made by Lone Star. Thus, Pacific Mutual is not a fiduciary of the plan with respect to the coverage determination at issue. The Court is of the opinion that Pacific Mutual is not a proper party defendant with respect to Plaintiffs' claims and that Pacific Mutual's motion for summary judgment should be granted.

C. Lone Star's Motion for Summary Judgment

Defendant Lone Star has moved for summary judgment on the ground that Ms. Sexton was not eligible for conversion. Lone Star maintains that it was not required to convert the policy. The law firm's group policy provided that a converted policy would be in the form "then customarily issued by the Company for conversion purposes. . . ." The Lone Star policy

in use at the time of Ms. Sexton's application for conversion provided that no one who was eligible for similar benefits under another plan or under state or federal law, which similar benefits would result in overinsurance by Lone Star's standards, could be eligible for the Lone Star policy. Lone Star finds further support for its determination in the Texas Insurance Code: "An insurer shall not be required to issue a converted policy covering any person if: (aa) such person is or could be covered by medicare . . ." Tex. Ins. Code art. 3.51-6, sec. 1(d)(3)(A)(ii).

Ms. Sexton is eligible for Medicare. Although the Medicare benefits do not adequately provide for Ms. Sexton's nursing care needs, the Court is of the opinion that the availability of these benefits renders Lone Star neither contractually nor statutorily required to issue a converted policy. As a result, Plaintiffs cannot show that Lone Star arbitrarily and capriciously denied conversion, and Lone Star's motion for summary judgment should be granted.

III. CONCLUSION

Having reviewed the arguments of counsel and the applicable law, the Court concludes that Plaintiffs' state law claims for breach of contract are preempted by federal law, Defendant Pacific Mutual is not a proper party defendant to this action, and Defendant Lone Star did not have an obligation to convert the group policy to an individual policy.

The Court is of the opinion, therefore, that Plaintiffs' motion for summary judgment should be denied and Defendants' motions for summary judgment should be granted.

A judgment in conformance with this opinion will be entered this same date.

SIGNED this 21 day of June, 1989.

/s/David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

[U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED JAN 11 1990 NANCY DOHERTY, CLERK By Deputy]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-87-442-K

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of JULIE SEXTON, an Incapacitated Person, Plaintiffs,

vs

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY, Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Mike Sexton, Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on June 25, 1989, the Order denying Plaintiff's Motion for Summary Judgment and the Order granting both Defendants Motion for Summary Judgments.

Respectfully submitted,
KELLEY, DAVIS & BATES,
A P.C.
BY: /s/T. Bates
Timothy E. Kelley
State Bar No. 11206000

Tim Bates
State Bar No. 01912750
6200 LBJ Freeway,
Suite 240
Dallas, Texas 75240-6305
(214) 661-5150

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on this the 10 day of January, 1990 by Certified Mail, Return Receipt Requested with postage prepaid upon the offices of:

Mr. William F. Peters, Jr.
1300 Continental Plaza
Ft. Worth, Texas 76102

Mr. Stephen Fink
3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201

/s/T. Bates
Tim Bates

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA-87-442-K

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of JULIE SEXTON, an Incapacitated Person, Plaintiffs

vs

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY, Defendants.

AFFIDAVIT OF NOTICE OF JUDGMENT

STATE OF TEXAS
COUNTY OF DALLAS

"My name is Timothy Mark Bates. I am of legal age and sound mind and I am otherwise competent to make this Affidavit. Unless otherwise stated, all the facts set out in the Affidavit are based upon my own personal knowledge.

I am an attorney that has been helping Timothy E. Kelley with the above referenced case on behalf of the Plaintiffs. The first knowledge that myself or anyone in my law firm had of Judge Belew's June 25, 1989 judgment was when my legal assistant, Barbara Charlebois, phoned the Court on December 19, 1989 inquiring into the status of Plaintiff's Motion for Summary Judgment and Defendants' Motions for Summary Judgment. At that time, Barbara Charlebois was told that the Court had entered an Order on June 25, 1989 denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment. Our office immediately asked for a copy of the Order and a copy of the Judgment and

Memorandum Opinion arrived to our office for the first time after December 19, 1989 and some time later in the latter days of December, 1989. After December 19, 1989, I contacted one of the attorneys for Defendant Pacific Mutual Insurance Company, Stephen Sloan, and inquired whether he had any notice of the Judge's June 25, 1989 Judgment. Mr. Sloan advised me that he did not have any knowledge that the Judge had ruled on either of the Summary Judgment Motions and that he was going to request a copy of the Judgment as well.

I declare under the penalty of perjury and the laws of the United States and Texas that the foregoing is true and correct.

Further affiant sayeth not."

/s/Timothy Mark Bates
Timothy Mark Bates, Affiant

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, personally appeared Timothy Mark Bates, known to me to be the person whose name is subscribed to the foregoing document, and after having been duly sworn, stated on his oath that he is an attorney for Plaintiffs in the above captioned case and that he has read the foregoing Affidavit and that the same is true and correct.

Subscribed and sworn to before me by the above named affiant this 10th day of January, 1990 to certify which witness my hand and seal of office.

/s/Teresa A. Guillory
Notary Public in and for the State of Texas
My Commission Expires: 8/14/93

[SEAL]

[U.S. COURT OF APPEALS FILED FEB 7 1990
GILBERT E. GANUCHEAU CLERK]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1033
USDC No. CA4-87-442-A

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of JULIE SEXTON, an Incapacitated Person, Plaintiffs-Appellants,

versus

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY, Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

Before KING, WILLIAMS, and DAVIS, Circuit Judges.

BY THE COURT:

This Court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Federal Rule of appellate Procedure 4(a)(1) requires that the notice of appeal in a civil case be filed within thirty days of entry of judgment. In this action to recover employer benefits, the district court entered final judgment on June 21, 1989. Sexton's notice of appeal was filed on January 11, 1990, well beyond the time limitation. The time limitation for filing a notice of appeal is jurisdictional, and the lack of a timely notice mandates dismissal of the appeal. Robbins v.

Maggio, 750 F.2d 405, 408 (5th Cir. 1985). This Court has not authority to extend the time to appeal on the basis of excusable neglect. Pryor v. U.S. Postal Service, 769 F.2d 281, 285 (5th Cir. 1985).

APPEAL DISMISSED.

[U.S. COURT OF APPEALS FILED MAR 28 1990
GILBERT F. GANUCHEAU CLERK]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1033
USDC No. CA4-87-442-K

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of JULIE SEXTON, an Incapacitated Person, Plaintiffs-Appellants,

versus

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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Before KING, WILLIAMS, and DAVIS, Circuit Judges.

BY THE COURT:

Sexton's petition for rehearing is DENIED. This Court has no authority to extend the time to appeal on the basis of good cause or excusable neglect. *See* Pryor v. U.S. Postal Service, 769 F.2d 281, 285 (5th Cir. 1985). Only the district court has authority to grant relief from the effect of an untimely filing, and the district court can generally do so only if relief is sought within the time limitations of Fed. R. App. P. 4(a)(5). *See* Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521, 522 (5th Cir. 1980). In any event, the district court is not authorized to grant relief from the failure to

appeal within the prescribed time based solely on lack of notice of entry of judgment. *See* Nelson v. Foti, 707 F.2d 170, 171-72 (5th Cir. 1983).

No. 89-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person,

Petitioner,

v.

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC MUTUAL LIFE INSURANCE COMPANY

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and
STEVEN W. SLOAN
ELIZABETH A. SCHARTZ

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Attorneys for Respondent
PACIFIC MUTUAL LIFE
INSURANCE COMPANY

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed petitioner's appeal as untimely because he failed to file a notice of appeal within thirty days after the date of entry of the judgment appealed from.

2. Whether the court of appeals violated petitioner's right to due process under the Fifth Amendment by dismissing his appeal.

LIST OF PARTIES

1. Mike Sexton, individually and as limited guardian of the separate estate of Julie Sexton, an incapacitated person
2. Pacific Mutual Life Insurance Company[1]
3. Lone Star Life Insurance Company

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[1] Pacific Mutual Life Insurance Company has no parent companies or subsidiaries (except wholly-owned subsidiaries).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person,

Petitioner,

v.

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC MUTUAL LIFE INSURANCE COMPANY

STATEMENT OF THE CASE

Petitioner Mike Sexton, individually and as limited guardian of the separate estate of Julie Sexton ("Sexton"), brought this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, to recover employee benefits from respondents Pacific Mutual Life Insurance Company ("Pacific Mutual")[2] and Lone Star Life Insurance

[2] The Petition for Writ of Certiorari incorrectly calls this respondent "Pacific Mutual Insurance Company."

Company ("Lone Star"). *App.* A-3 & A-4.[3] In the trial court, Sexton, Pacific Mutual, and Lone Star all moved for summary judgment. On June 21, 1989, the United States District Court for the Northern District of Texas, Judge David O. Belew, Jr., issued a memorandum opinion granting respondents' motions and denying Sexton's motion and a judgment in favor of Pacific Mutual and Lone Star. *App.* A-1 & A-2. The judgment was entered on the docket on June 25, 1989. *App.* A-1.

Evidently, through a clerical error, the district clerk did not serve notice of the entry of judgment when it was entered on the docket. Counsel for Sexton did not learn that judgment had been entered against their client until December 19, 1989, when a legal assistant in their office telephoned the court. *App.* B-4. This apparently was the first time Sexton's counsel had contacted the district court to inquire about the status of the case.

Sexton did not seek relief in the district court from the clerk's oversight. Instead, on January 11, 1990, he filed a notice of appeal from the judgment. *App.* B-1. On February 7, 1990, the United States Court of Appeals for the Fifth Circuit, on its own motion, dismissed the appeal as untimely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. *App.* C-1. The Fifth Circuit denied Sexton's motion for rehearing on March 28, 1990. *App.* D-1.

SUMMARY OF THE ARGUMENT

Sexton argues that the court of appeals improperly dismissed his appeal as untimely and violated his right to due process in doing so. The action of the court of appeals was entirely proper, however, and the issues the petition raises in any event are not of particular import and do not divide the

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[3] References are to pages of the Appendix to the Petition for Writ of Certiorari.

courts of appeal. Sexton filed his notice of appeal long after the time for doing so expired because of his misplaced reliance on receiving timely notice of the entry of judgment from the district clerk. Sexton then compounded his error by failing to seek relief from the only court empowered to grant it to him, the district court. Sexton's bald assertion that the court of appeals deprived him of due process by dismissing his appeal pursuant to the federal rules likewise is meritless. Requiring a party to comply with the reasonable requirements of procedural rules is not a violation of due process.

ARGUMENT

This case presents no novel or important questions for the Court's consideration. The only issue the petition raises is whether the court of appeals properly dismissed Sexton's notice of appeal as untimely. A more straightforward and unremarkable issue is scarcely conceivable.

A. The Court of Appeals Properly Dismissed Sexton's Appeal Pursuant to the Plain Terms of the Federal Rules of Civil and Appellate Procedure.

A notice of appeal must "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." FED.R.APP.P. 4(a)(1). "A judgment . . . is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FED.R.APP.P. 4(a)(6). The judgment against Sexton therefore was entered on June 25, 1989. He did not file his notice of appeal, however, until January 11, 1990, approximately six and one-half months later.

Sexton argues, albeit somewhat indirectly, that he timely filed his notice of appeal nevertheless because he filed it within thirty days after the date *he* received *notice* of the

entry of the judgment. The thirty-day period for appealing, however, runs from "the date of *entry* of judgment." FED.R.APP.P. 4(a)(1) (emphasis added). Moreover, "[l]ack of notice of the entry [of judgment] by the clerk does *not* affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed . . . ." FED.R.CIV.P. 77(d) (emphasis added). Indeed, Rule 77(d) was amended in 1946 precisely to foreclose the argument Sexton makes here. As the Advisory Committee Note explains:

> Rule 77(d) as amended makes it clear that *notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry.* Notification by the clerk is merely for the convenience of litigants.

FED.R.CIV.P. 77 advisory committee note (emphasis added). Sexton's contention that his notice of appeal was timely because it was filed within thirty days after he received notice of its entry therefore is absolutely irreconcilable with the plain meaning of the rules.

Sexton next complains that the court of appeals somehow erred in not construing his appeal as timely because of the clerk's failure to give him notice that the judgment had been entered. The short but definitive rebuttal to that contention is that the court of appeals had no power to grant Sexton such relief. The thirty-day period for filing a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). The court of appeals therefore was prohibited from extending that period. FED.R.APP.P. 2, 26(b).

It is not surprising, then, that Sexton identifies only one decision, *Buckeye Cellulose Corp. v. Braggs Electric Construc-*

tion Co., 569 F.2d 1036 (8th Cir. 1978), that he says reveals a conflict in the circuits on the question. A cursory review of *Buckeye*, however, reveals no such conflict. Indeed, *Buckeye* is distinguishable from this case on two fundamental grounds. Foremost, the party in that case sought relief from the *district court* pursuant to FED.R.CIV.P. 60(b)(6) for the clerk's failure to notify the parties of the entry of judgment. *Id.* at 1037. Of course, district courts, but *not* courts of appeal, are empowered to grant such relief under appropriate circumstances. In addition, in *Buckeye* the party called the clerk's office three times to inquire about the status of the case before judgment was entered and was assured that the parties would be notified promptly when the district court's decision was filed. *Id.* Sexton, on the other hand, evidently did not even inquire about the status of the case until over six months after judgment already had been entered against him. Thus, because Sexton's tardiness in appealing apparently was the result of his lack of diligence rather than some misrepresentation by the district clerk, and because relief under Rule 60(b)(6) is not warranted merely because of the clerk's failure to mail notice of the entry of judgment, *see Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed*, 468 U.S. 1222 (1984), Sexton probably would not have been able to demonstrate that he was entitled to relief even if he had sought it in the proper forum.

B. The Dismissal of Sexton's Appeal Did Not Deprive Him of Due Process.

Although Sexton's petition presents the question whether the Fifth Circuit's decision deprived him of due process of law, he does not cite any authority or offer any theory that would entitle him to relief under the Fifth Amendment's Due Process Clause. It is thus unclear whether Sexton claims that due process requires appellate review even where the adequacy of the trial court proceedings are not questioned, or

whether Sexton merely claims a due process right to notice of entry of judgment to preserve appellate review. In either case, principles of due process do not entitle Sexton to relief.

Although litigants have a due process right to a full and fair opportunity to present their claims, neither this Court nor any other ever has indicated that due process requires appellate review. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954); *McKane v. Durston*, 153 U.S. 684, 687 (1894); *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954); *Ackermann v. United States*, 178 F.2d 983, 985 (5th Cir. 1949), *aff'd on other grounds*, 340 U.S. 193 (1950). As this Court noted in *Luckenbach Steamship Co. v. United States*, 272 U.S. 533, 536 (1926), "appellate review is not essential to due process of law, but is [a] matter of grace."

Granted, once a system of appellate review is established, access to it cannot be denied on a discriminatory basis. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Lindsey*, 405 U.S. at 77. This "right" to appeal, however, is subject to reasonable procedural requirements. *Cf. Arn v. Thomas*, 474 U.S. 140, 155 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). One such requirement, that a notice of appeal be filed within thirty days of entry of judgment, is reflected in FED.R.APP.P. 4(a). Sexton does not allege that this time limitation violates due process. On the contrary, Rule 4(a) forwards the interest of judicial efficiency and fairness to litigants by preserving the finality of judgments. *See, e.g., Hall v. Community Mental Health Center*, 772 F.2d 42, 46 (3d Cir. 1985); *Fidelity & Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 748-49 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Perhaps Sexton's unarticulated theory instead is that he has a due process right to rely absolutely on the clerk to notify him of entry of judgment in time to preserve appellate review.

If this is Sexton's view, no authority exists to support it. On the contrary, the plain meaning of Rule 77(d) and the cases construing it give ample notice that a party seeking to preserve his right to appeal may *not* rely on timely receiving notice of entry of judgment from the clerk. The advisory committee note to Rule 77(d) counsels that "[i]t would . . . be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment . . . ." FED.R.CIV.P. 77(d) advisory committee note. Similarly, the Fifth Circuit, sitting en banc, has warned litigants of "unwarranted reliance" on the clerk to provide timely notice, *Wilson*, 725 F.2d at 258, and reaffirmed its longstanding position that "the simple failure of the clerk to mail notice of the entry of judgment, without more, does not permit relief to a party who has failed to appeal within the prescribed time." *Id.* at 257; *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986) (per curiam) (Rule 77(d) places "an independent duty [on parties] to keep informed . . . ."); *Hall*, 772 F.2d at 46 ("[T]he final sentence in Rule 77(d) . . . places the burden of monitoring the process of the case on the parties . . . ."). As the Fifth Circuit in *Fidelity & Deposit Co.* noted,

> [t]he rationale of the [1946] amendment [to Rule 77] was to enhance the finality of judgments by placing the entire burden of determining whether a judgment had been entered upon the parties. Under amended Rule 77(d), they could place no justifiable reliance upon the fact that no notice of entry of judgment had been received from the clerk, but rather they were obliged to inquire periodically of the clerk or of the district court to determine whether judgment had been entered. -

523 F.2d at 749. The placement of this obligation on litigants, who, after all, have invoked the aid of the courts in the first

instance, is patently reasonable and accords with due process.[4]

Even so warned of this duty, however, in appropriate circumstances litigants can obtain from the district courts extensions of the time in which to appeal. *See* FED.R.APP.P. 4(a)(5) ("The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed no later than 30 days after the expiration of the time prescribed by this Rule 4(a)."); FED.R.CIV.P. 60(b) ("On motion and upon such terms as are just, the [district] court may relieve a party . . . from a final judgment . . . ."). Sexton, however, did not seek relief from the district court. Thus, Sexton must maintain that due process requires not only that he be afforded relief from the time limitations of FED.R.APP.P. 4(a) and the mandate of FED.R.CIV.P. 77(d), but also that he receive that relief from the court of appeals.

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[4] In *Arn*, this Court upheld an analogous procedural rule against a due process challenge. The rule in *Arn*, promulgated under the Sixth Circuit's supervisory power, provided that the failure to file objections to a magistrate's report within ten days waived subsequent review in the court of appeals. In rejecting the due process claim, the Court wrote that

> [petitioner's statutory right of appeal] was not denied, however; it was merely conditioned upon the filing of a piece of paper. Petitioner was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless. We recently reiterated our longstanding maxim that "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*[,455 U.S. at 437]. The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable.

Arn, 474 U.S. at 155.

Due process, however, does not require that appellate courts be empowered to waive appellate time limits. As noted above, this Court has interpreted Rule 4(a) to be "mandatory and jurisdictional." *Browder*, 434 U.S. at 264; *see also* FED.R.APP.P. 2, 26(b). The import of this construction, as the Fifth Circuit recognized below, is that whatever the equities of the particular situation may be, the courts of appeal are without authority to extend the time in which to appeal; any application for relief must be addressed to the district court. Indeed, because Sexton did not seek relief from the district court, the question of whether he would have been entitled to such relief as a matter of due process is not before this Court.

In essence, then, to uphold Sexton's due process claim, this Court would have to hold the following: (1) litigants and their counsel may ignore Rule 77(d)'s unambiguous mandate and rely entirely on the clerk to notify them of the entry of judgment; (2) the time limitations of Rule 4(a), which otherwise are mandatory and jurisdictional, must be waived where the clerk fails to provide timely notice, even if relief under FED.R.APP.P. 4(a)(5) and FED.R.CIV.P. 60(b) would be unavailable; and (3) in spite of FED.R.APP.P. 2 and 26(b), the courts of appeal must have the power to grant such relief where the litigant fails to seek it from the district court.

Due process does not require so much. The Federal Rules of Civil and Appellate Procedure and judicial decisions provided Sexton with ample notice that he could not rely entirely on the clerk timely to notify him of the entry of judgment and, if he wished to file a notice of appeal more than thirty days after the judgment was entered, that his only avenue for relief was the district court. Sexton failed to heed that notice and thus made not one but two mistakes: (1) he did not contact the district clerk to monitor the status of the case; and (2) when he discovered his error, he failed to seek

relief from the only court empowered to grant it. Although Sexton blames the district clerk for the tardiness of his appeal, then, his appeal was dismissed as untimely simply because he failed to understand or follow the Federal Rules. Thus, the petition raises no more of a due process issue than any other case dismissed on procedural grounds.

CONCLUSION

Sexton's petition for writ of certiorari is meritless. The Federal Rules of Civil and Appellate Procedure dictated the dismissal of his untimely appeal, and Sexton's assertion that the court of appeals' action denied him due process is utterly without foundation. Moreover, notwithstanding the merits, no reason exists for granting the petition. The decision of the court of appeals is not in conflict with any decision of any other court of appeals or this Court, and the petition does not otherwise implicate any important legal issues. Pacific Mutual

therefore respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 1990, all parties required to be served have been served with three true and correct copies of the foregoing Brief in Opposition of Respondent Pacific Mutual Life Insurance Company by mailing same first-class mail, postage prepaid, to their counsel of record:

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